SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 153

ALVIN F. FIX, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court for the Eastern District of Pennsylvania

No. 16064. March term, 1931

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DIST. OF PENNSYLVANIA

vs.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY

Docket entries

Mar. 18, 1931, Praecipe to issue summons, filed.
Mar. 18, 1931, Summons exit—returnable 1st Monday in April.
Mar. 18, 1931, Statement of claim, filed.
Mar. 18, 1931, Notice to file affidavit of defense, filed.
Apr. 9, 1931, Summons returned—on March 27, served each defendant, and filed.
Dec. 11, 1931, Affidavit of defense by National Surety Company, filed.
Dec. 31, 1931, Motion for judgment for want of sufficient affidavit of defense, filed.
Dec. 31, 1931, Praecipe to enter rule for judgment for want of sufficient affidavit of defense, filed.
2 Jan. 25, 1932, Argued sur rule for judgment for want of sufficient affidavit of defense.
Apr. 13, 1932, Opinion, Kirkpatrick, J., adjudging affidavit of defense to be sufficient, filed.
July 20, 1932, Praecipe to enter judgment for defendant, filed.
July 20, 1932, Suggestion of death of Joseph S. MacLaughlin and requesting the substitution of Albert H. Ladner, collector of internal revenue, filed.
July 21, 1932, Certificate of probable cause, filed.
July 26, 1932, Judgment in favor of defendants, filed.
Sept. 14, 1932, Assignments of error, filed.
Sept. 14, 1932, Petition for appeal, filed.
Sept. 14, 1932, Order of court granting appeal, filed.
Sept. 14, 1932, Exception and order of court granting exception, filed.
Sept. 14, 1932, Citation allowed and issued.
Sept. 14, 1932, Praecipe for transcript of record sur appeal, filed.
Sept 14, 1932, Copy of notice of appeal, filed.
Sept. 20, 1932, Citation returned—service accepted—and filed.

3 In United States District Court

[Title omitted].

Plaintiff's statement of claim

Filed March 18, 1931

The plaintiff, by Paul Freeman, assistant United States attorney for the eastern district of Pennsylvania, complaining of the defendants, alleges:

I

That the plaintiff is a citizen of the United States and of the State of Pennsylvania, and resides at Philadelphia, in the county of Philadelphia, State of Pennsylvania.

II

That the defendant Philadelphia Barge Company was at all times hereinafter mentioned and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was at such times, and now is authorized to engage in business in the State of Delaware, and also in the State of Pennsylvania, and
4 has a post-office address and place of business, at which it may be served with process, at 211 Mariner and Merchant Building, 308 Chestnut Street, city and county of Philadelphia, in the State and eastern judicial district of Pennsylvania, and within the jurisdiction of this court.

III

That the defendant National Surety Company was at all times herein mentioned, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to engage in business in that State and also in the State of Pennsylvania, and was, and is now, so engaged, and has a place of business at which it may be served with process at Packard Building, in the city and county of Philadelphia in the State and eastern judicial district of Pennsylvania within the jurisidiction of the court.

IV

At the time of the signing, sealing, and delivery of the writing obligatory hereinafter set forth and thereafter until August 1, 1921, Ephraim Lederer, named therein, was the collector of internal revenue of the United States for the first collection district of Pennsylvania, and as such collector was charged with the collection in said district of taxes due to the internal revenue laws of the United States; that on or about July 31, 1921, said Ephraim Lederer resigned his office and was succeeded directly in said office as collector,

by Blakely D. McCaughn, and said Blakely D. McCaughn retained his said office until December 31, 1927, and was succeeded in said office by W. E. Brown, who had said office, and had and performed the duties of said collector from January 1, 1928, until May 31, 1928. On June 1, 1928, Joseph S. MacLaughlin became, and since said date he has been and now is, the duly appointed, qualified, and acting collector of internal revenue of the United States for the first collection district of Pennsylvania, and, as such collector, by virtue of his said office, said Joseph S. McLaughlin was charged and now is charged with the collection of taxes due under the internal revenue laws of the United States in said first collection district, and with all the other duties to said office pertaining.

V

Joseph S. MacLaughlin is now the duly appointed, qualified, and acting collector of internal revenue of the United States for the first collection district of Pennsylvania, and he is one of the successors of said Ephraim Lederer in said office, and, as such, is charged with all the duties pertaining thereto, and with all the rights, privileges, and duties of said office, and, inter alia, with all the rights that formerly vested in said Ephraim Lederer under the writing obligatory hereinafter set forth. Said Joseph S. MacLaughlin is likewise charged with the collection in said district of all moneys due the United States under the internal revenue laws of the United States, and under all bonds given in connection therewith.

VI

That the United States is a corporation sovereign and body politic.

VII

That this is a suit arising under an act of Congress providing for internal revenue.

6

VIII

That the Commissioner of Internal Revenue assessed, on the list of assessments for October 1920, against the said Philadelphia Barge Company an additional corporation income and profits tax of $12,635.00 on account of income and profits received by it during the calendar year ended December 31, 1918.

IX

That on or about February 15, 1921, and said Philadelphia Barge Company, being then so assessed, filed with the collector of internal revenue of the first collection district of Pennsylvania a claim for abatement of the said tax.

X

That on or about February 17, 1921, at the city and county of Philadelphia, State of Pennsylvania, in connection with the filing of its said claim for abatement, and in consideration that the collector refrained from and suspend the immediate collection of the tax assessed as aforesaid, pending, a finding by the Commissioner of Internal Revenue of the amount due, in respect to its said claim for abatement the defendant, Philadelphia Barge Company, by J. P. Tierney, its president, attested, by D. T. Sheridan, its secretary, as principal, and the defendant, National Surety Company, by Chas. Lloyd, resident and vice president, attested by Mary A. Heym, resident assistant secretary, as surety, signed, sealed with the corporate seals of the respective defendants and delivered to Ephraim Lederer, collector of internal revenue, first district of Pennsylvania, a writing obligatory or bond, whereby the said Philadelphia Barge
7 Company and National Surety Company firmly bound themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally to pay to said Ephraim Lederer, collector of internal revenue, first district of Pennsylvania, or his successors, the sum of twelve thousand, six hundred thirty-five dollars ($12,635).

Said writing obligatory contained a condition, in substance, that the Philadelphia Barge Company claimed the income and profits tax assessed against it to be unreasonable, and if the principal should on notice and demand by the collector duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of twelve per centum per annum from the time such tax would have been due had no claim for abatement been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then the obligation to be void, but otherwise to remain in full force and virtue.

A copy of said writing obligatory is hereto annexed, made a part hereof the same as fully rewritten herein, and marked "Exhibit A" for convenience of reference.

XI

That after the execution and delivery of said writing obligatory, or bond, the Commissioner of Internal Revenue considered said claim for abatement and, on or about May 14, 1923, rejected the same in the full amount thereof, and found the correct amount of tax to be as assessed, $12,635.00; that thereupon, on said May 14, 1923, notice of the finding of the Commissioner in respect to said claim for abatement and of the amount of tax due was given to the Philadelphia Barge Company and demand made of it by the collector of
8 internal revenue, first district of Pennsylvania, for payment of said sum of $12,635.00 with interest, but said defendant failed, neglected, and refused, and still fails, neglects and refuses to pay said amount, or any part thereof.

XII

That on or about May 20, 1926, the collector of internal revenue, first district of Pennsylvania, gave notice to the National Surety Company, defendant, of the finding of the Commissioner of Internal Revenue in respect to said claim for abatement and of the neglect, failure, and refusal of the Philadelphia Barge Company to pay on notice and demand by the collector, the amount found due by the Commissioner, and demanded that it, the said National Surety Company, pay the said sum of $12,635.00 so found due. Said National Surety Company, notwithstanding said notice and demand has wholly failed, neglected and refused to pay said $12,635.00, or any part thereof, and does so still refuse, neglect, and fail.

XIII

That by reason of the foregoing, said writing obligatory has become absolute, and pursuant to the terms thereof, the defendants are, and each of them is, indebted to the plaintiff in the sum of $12,635.00 with equal interest thereon from the 20th day of May, 1926.

Wherefore, the plaintiff prays judgment against the said Philadelphia Barge Company and National Surety Company, and each of them, in the sum of twelve thousand, six hundred, thirty-five dollars ($12,635.00) with interest at six per centum per annum from May 20, 1926, and costs herein.

PAUL FREEMAN,
Asst. United States Attorney,
Attorney for Plaintiff.

9 [Duly sworn to by Joseph A. MacLaughlin, jurat omitted in printing.]

Exhibit "A" to statement of claim

Know all men by these presents, that Philadelphia Barge Company, as principal, and National Surety Company, a corporation under the laws of the State of New York, as surety, are held and firmly bound unto Ephraim Lederer, collector, first district, Pennsylvania, or his successors, in the sum of twelve thousand six hundred thirty-five ($12,635.00) dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, the Philadelphia Barge Company claims that the
10 income and profits tax assessed against it is unreasonable and unjust to it and should not be demanded.

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of twelve percent per annum from the time such

tax would have been due had no claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations then the obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this seventeenth day of February 1921.

PHILADELPHIA BARGE COMPANY,
By J. P. TIERNEY [SEAL]
President.

Attest:
D. T. SHERIDAN,
Secretary.

NATIONAL SURETY COMPANY,
By CHAS. LLOYD [SEAL]
Res. Vice Pres.

Attest:
MARY A. HEYM,
Res. Asst. Secty.

Signed, sealed, and delivered in the presence of J. M. Malmead, Dorothy Lipschitz.

Bond approved this second day of May 1921.

Collector of Internal Revenue.

11 In United States District Court

Affidavit of defense

Filed December 11, 1931

STATE OF NEW YORK,
City and County of New York, ss:

A. C. Millikan, being duly sworn according to law, deposes and says that he is vice president of National Surety Company, one of the defendants named in the above-entitled proceeding; that he is authorized to execute this affidavit of defense for and on behalf of the said company, and avers that the said National Surety Company has a just, true, complete, and legal defense to the whole of the plaintiff's claim of the following character and nature, to wit:

1. The averments of paragraph 1 are admitted.

2. Defendant denies that the Philadelphia Barge Company was, at the time of the filing of the statement of claim in the above-entitled proceeding or at any time subsequent thereto, a corporation existing under and by virtue of the laws of the State of Delaware, and avers that the said company has not been in existence at any time since January 1923, at which time its charter was forfeited by the State of Delaware for nonpayment of taxes. Defendant denies that the said Philadelphia Barge Company was authorized to engage in business in the State of Delaware or the State of Pennsylvania at the

time of the filing of the said statement of claim in the above-entitled proceeding or at any other time subsequent to January 1923, and further denies that it had a post-office address and place of business in the city and county of Philadelphia, State of Pennsylvania, or at any other place at which it might be served with process at the
12 time of the filing of the said statement of claim, or at any other time subsequent to January 1923.

Defendant further avers that the said Philadelphia Barge Company was not at the time of the beginning of the above-entitled proceeding, or at any time subsequent thereto, within the jurisdiction of this court.

3. The averments of paragraph 3 are admitted.

4. The averments of paragraph 4 are admitted.

5. It is admitted that Joseph S. MacLaughlin is now the duly appointed, qualified, and acting collector of internal revenue of the United States for the first collection district of Pennsylvania. It is denied that the said Joseph S. MacLaughlin is vested with any rights under the said writing obligatory for the reasons hereinafter set forth.

6. The averments of paragraph 6 are admitted.

7. The averments of paragraph 7 are admitted.

8. Defendant admits the Commissioner of Internal Revenue assessed against the Philadelphia Barge Company an additional income and profits tax amounting to $12,635 for the calendar year ending December 31, 1918. Defendant denies, however, that the said tax was assessed against the said Philadelphia Barge Company on account of income and profits received by it during the said calendar year, in that the said corporation did not have or receive sufficient income or profits during the said year to warrant an additional income and profits tax in the said amount, as is hereinafter set forth.

13 9. The averments of paragraph 9 are admitted.

10. Defendant admits that on or about February 17, 1921, the Philadelphia Barge Company as principal and the National Surety Company as surety signed, sealed with their respective corporate seals and delivered to Ephraim Lederer, then collector of internal revenue for the first district of Pennsylvania, an instrument, referred to in plaintiff's statement of claim as a bond or writing obligatory, a copy of which is attached to said statement of claim and marked "Exhibit A." Defendant denies, however, that by said instrument the Philadelphia Barge Company and the National Surety Company bound themselves, their heirs, executors, administrators, and assigns unto Ephraim Lederer, collector as aforesaid, or his successors, in the sum of $12,635, or in any other sum or amount, in that there was no consideration for the signing, sealing, and delivering of the said instrument by the said Philadelphia Barge Company and the said National Surety Company. Defendant

denies that the consideration of the signing, sealing, and delivering of the said instrument was that the said Ephraim Lederer, collector as aforesaid, would refrain from and suspend the immediate collection of the said tax assessed as aforesaid pending a finding by the Commissioner of Internal Revenue of the amount due in respect to the claim for abatement filed by the said Philadelphia Barge Company, and avers that the said collector could have taken such steps as he deemed necessary for the collection of the said tax immediately after the said instrument was signed, sealed, and delivered as aforesaid and at all time subsequent thereto.

14 Defendant admits that the Philadelphia Barge Company not only claimed that the said income and profits tax assessed against it as aforesaid was unreasonable, but also claimed that it was illegal and without warrant or authority in law, and further admits that the said instrument contained a condition to the effect that if the principal should, on notice and demand by the collector, duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of twelve percent per annum from the time such tax would have been due had no claim for abatement been filed, and should otherwise well and truly perform and observe all the provisions of law and the regulations, then the obligation to be void, but otherwise to remain in full force and virtue.

11. Defendant denies that the Commissioner of Internal Revenue considered that the said claim for abatement after the execution and delivery of the said instrument or at any other time. Defendant is advised, believes, and therefore avers that after the execution of the said instrument, the Commissioner of Internal Revenue requested the said Philadelphia Barge Company to submit additional information in support of the said claim for abatement and because of the failure of the said company to submit the requested information, the said claim for abatement was rejected in the full amount thereof.

Defendant denies that the correct amount of the tax for the year 1918 was $12,635 and denies that the said Commissioner of Internal Revenue found or could find this amount to be legally and properly due for the said year.

15 Defendant avers that the said Commissioner of Internal Revenue, in determining the net taxable income of the said Philadelphia Barge Company for the year 1918, upon which net taxable income the said additional assessment of tax is based, allowed depreciation on barges owned by the said company during the said year at the rate of only three percent per annum. Defendant is advised and therefore avers that all of the said barges owned by the said Philadelphia Barge Company during the year 1918 were acquired by the said company during the year 1916 and were secondhand barges at the time of acquisition by the said Philadelphia Barge Company. Defendant is advised and therefore avers that during the year 1918 the said Philadelphia Barge Company

owned four wooden barges and that a proper rate of depreciation on the said barges for the said year was eighteen and three-quarters percent. Defendant is advised and therefore avers that in determining the net taxable income of the Philadelphia Barge Company for the year 1918 there should have been allowed a deduction for depreciation on barges amounting to $8,761.31 instead of $3,302.72, the amount allowed by the said Commissioner of Internal Revenue in arriving at the said additional assessment of tax against the said Philadelphia Barge Company for the year 1918.

Defendant denies that on May 14, 1923, notice of the finding of the said Commissioner in respect to the said claim for abatement and the amount of tax due was given to the said Philadelphia Barge Company and demand made upon the said company for payment of the said tax with interest, in that the said Philadelphia Barge Company was not then in existence, its charter having been for-
16 feited during January of 1923. Defendant admits that the said Philadelphia Barge Company has failed, neglected, and refused, and still fails, neglects, and refuses to pay the said tax or any part thereof in that the said Philadelphia Barge Company is out of existence and has been out of existence since prior to the beginning of the above-entitled proceeding. Defendant further avers that neither the said tax nor any part thereof is properly or legally due for the said year.

12. Defendant admits the averments of paragraph 11 of the statement of claim and avers that the said tax in the amount of $12,635 is not legally or properly due for the said year for the reasons set forth in paragraphs 10 and 11 hereof and in paragraphs 14 to 19, inclusive.

13. Defendant denies that the said writing obligatory has become absolute, and further denies that the said defendants named in this proceeding, or either of them, is indebted to the plaintiff in the sum of $12,635 with interest thereon from May 20, 1926, or any other amount.

14. As a separate and further defense, defendant avers that the writing obligatory or bond filed with Ephraim Lederer, collector as aforesaid, on February 17, 1921, was given for the purpose of better securing the said collector of internal revenue for the payment of whatever additional income and profits tax was found properly and legally due from the Philadelphia Barge Company for the year 1918, provided, of course, that the said tax was assessed and collection thereof made within the proper statutory period as provided by the internal revenue acts properly applicable thereto.

17 15. Defendant avers that in this proceeding plaintiff is endeavoring to collect an additional income and profits tax assessed against the Philadelphia Barge Company for the year 1918.

16. Defendant avers that the said Philadelphia Barge Company duly filed its income and profits tax return for the calendar year 1918 in the office of the then collector of internal revenue for the

first district of Pennsylvania on April 29, 1919, and further avers that the above-entitled proceeding was not instituted until the 18th day of March 1931.

17. Defendant is advised, believes and therefore avers that under the provisions of section 250 (d) of the Revenue Act of 1918, section 250 (d) of the Revenue Act of 1921, and section 278 (e) of the Revenue Act of 1924, the plaintiff in this proceeding was, on the date when the proceeding was instituted, barred from beginning any suit or proceeding against the Philadelphia Barge Company and/or the National Surety Company for the collection of the tax for which this suit was instituted.

18. As a separate and further defense, defendant is advised, believes and therefore avers that under the provisions of section 1106 of the Revenue Act of 1924 the liability of the Philadelphia Barge Company and the National Surety Company, for the enforcements of which this proceeding was instituted, was extinguished prior to the beginning of the said proceeding and there is therefore no liability on the part of either the Philadelphia Barge Company or the National Surety Company to pay the tax, or any part thereof, for the collection of which the above-entitled proceeding was instituted.

18 19. As a further defense defendant avers that suit in assumpsit on the identical bond which is set forth as exhibit A to the statement of claim was brought by one Blakely D. McCaughn on August 6, 1926, as collector of internal revenue for the first district of Pennsylvania against the same defendants, in the United States District Court for the Eastern District of Pennsylvania, as of June term, 1926, no. 12356; that on September 30, 1930, judgment was entered in favor of the said Blakely D. McCaughn and against the defendant National Surety Company for want of a sufficient affidavit of defense. That the said Blakely D. McCaughn resigned as collector on December 31, 1927, and that upon December 13, 1930, a suggestion of abatement of cause of action and a rule to show cause why the judgment should not be stricken off and the cause of action abate were filed in accordance with section 11 of the act of February 13, 1925 (c. 229, 43 Stat. 941). That thereafter on December 22, 1930, a decree was entered by the said court striking the said judgment from the record by reason of the fact that the action upon which the said judgment was rendered had abated prior to the entry of the said judgment.

20. That if there was a cause of action upon the said bond the same has been lost by failure to comply with the said act. That the cause of action upon the said bond is by reason of the said order res adjudicata as by reference to the record in the said proceeding will more fully and at large appear.

Wherefore defendant National Surety Company claims it is not indebted to the plaintiff in any sum whatsoever.

19 All of which above-stated facts are true and correct to the best of affiant's knowledge and belief, and defendant expects to prove same upon the trial of this cause.

(Sgd.) A. C. MILLIKAN.

Sworn to and subscribed before me this 8th day of Dec., A.D. 1931.

(Sgd.) WM. M. WEAVER,
Notary Public.

In United States District Court

Motion for judgment for want of sufficient affidavit of defense

Filed Dec. 31, 1931

And now, to wit: Dec. 29, 1931, comes Edward W. Wells, United States attorney for the eastern district of Pennsylvania, the attorney for Joseph S. MacLaughlin, the plantiff above named, and sets forth that the affidavit of defense filed on behalf of the National Surety Company in the above-entitled case is insufficient in law in that it admits:

1. The assessment of the income-profits tax in the sum of $12,635 against the Philadelphia Barge Company, one of the defendants above named, for the year 1918 by the Commissioner of Internal Revenue.

2. The filing by the said Philadelphia Barge Company with the collector of internal revenue of its claim for the abatement of said taxes on February 15, 1921.

3. The signing, sealing, and delivery of the bond upon which suit was instituted.

20 4. That the said bond contained a condition to the effect that if the principal should, on notice and demand by the collector, duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of 12 percent per annum from the time such tax would have been due, had no claim for its abatement been filed, and should otherwise well and truly perform and observe all the provisions of law and regulations, then the said bond to be void; otherwise to be and remain in full force and virtue.

5. That the said claim for abatement by the Philadelphia Barge Company was rejected by the Commissioner.

6. The failure, neglect, and refusal of the Philadelphia Barge Company to pay the amount of tax found by the Commissioner to be due after notice to pay the same had been given.

7. That the said National Surety Company, on or about May 20, 1926, received notice of the neglect, failure, and refusal of the said Philadelphia Barge Company to pay the said tax,

and denies only:

1. The corporate existence of the Philadelphia Barge Company at the time suit was brought; service of process upon it and presence

in the jurisdiction of this court at the time suit was brought and since that time.

2. That the Philadelphia Barge Company has sufficient income to warrant the assessment of an additional tax for the year 1918.

21 3. That the plaintiff has a right to sue on the bond in question for the reason that the statute of limitations for the collection of taxes bars the suit.

4. That the taxes were regularly found to be due in that certain depreciations should have been allowed by the Commissioner.

5. That this matter is res adjudicata in that suit was instituted in the same court as of June term, 1926, to recover the aforesaid sum of $12,635, the plaintiff therein being Blakely D. McCaughn, then collector of internal revenue for the first collection district of Pennsylvania; that judgment was entered on behalf of the plaintiff in the aforesaid sum together with interest in 1930; that upon showing that the aforesaid Blakely D. McCaughn resigned as collector of internal revenue for the first collection district of Pennsylvania in 1927 the judgment in this case was stricken off and cause of action abated.

6. That there was a failure to comply with the act of February 13, 1925 (c. 229, 43 S. [illegible] 941).

The affidavit of defense is otherwise insufficient.

The plaintiff above named therefore, by his said attorney, moves that a rule be granted upon the National Surety Company, one of the defendants above named, to show cause why judgment should not be entered for the plaintiff for the full amount of its claim for want of a sufficient affidavit of defense.

EDWARD W. WELLS,
United States Attorney.

22 In United States District Court

Rules for judgment

Filed Dec. 31, 1931

Enter rule for judgment for want of sufficient affidavit of defense. Returnable January 25, 1932, at 10 o'clock a.m.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

Clerk, U. S. D. C., E. D. of Pa.

In United States District Court

Opinion sur motion for judgment for want of sufficient affidavit of defense

Filed April 13, 1932

KIRKPATRICK, *J.:*

The only question raised by this affidavit of defense is whether the cause of action is abated, the affidavit of defense being the statutory equivalent of a plea in abatement.

The suit is against principal and surety upon a bond given to secure payment of taxes. The bond was delivered to Lederer, then collector, on February 17, 1921, and the obligee is "Ephraim Lederer, Collector, First District, Pennsylvania, or his successors." Lederer resigned as collector July 31, 1921, and was succeeded by McCaughn. On August 6, 1926, McCaughn, then in office, brought an earlier suit upon this same bond. During the pendency of that suit McCaughn went out of office, December 31, 1927. He was succ-
23 ceeded by Brown, who acted until May 31, 1928, when he in turn was succeeded by MacLaughlin, the present collector. No substitution as provided for by the act of February 8, 1899, as amended up to February 13, 1925, U. S. C. A., title 28, section 780, was made within six months after the expiration of McCaughan's term.

McCaughan was the proper plaintiff in the former suit, and, if no prior suit had been brought it may be assumed that MacLaughlin, the present collector, would be the proper party to sue, in spite of the fact that he is not the obligee in the bond. Judge Hand in Bowers vs. American Surety Company, 30 Fed, (2d) 244, and following Tyler vs. Hand, 7 How. 572, accepts the theory of fictional personality which recognizes the office as a legal person and, upon grounds of policy and convenience, I think his view should be followed. He says. "Of the convenience of recognizing an office as a legal person in cases like that at bar there can be no question; the purpose of such bonds is to create an obligation in favor of the incumbents, as they succeed each other."

But in this case we have already had one suit brought by a successor of the original obligee, which suit was abated by reason of the failure of the Government to make substitution in compliance with the act of 1925, after the plaintiff had left office. Was there an abatement of the cause of action as well as of the writ? I think that it was the clear intent of the act of 1925 that there should be.

It will be noted that the act does not provide that the cause may be continued as a matter of right after the plaintiff has left
24 office by a mere formal substitution of his successor. The act says that if certain things are satisfactorily shown to the court it shall be competent for the court to permit the cause to be continued and maintained by the successor in office. Suppose the court, properly exercising the discretion thus given, decides against permitting the cause to be continued. To hold that the cause of action was not abated would mean that after the court had so refused to permit a substitution the abatement could be avoided and the act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector.

Such futile legislation is not presumed to have been in the mind of Congress. The act could have been only upon the theory that the cause of action abated. In addition there is no injustice in refusing to permit parties to be harassed by the necessity of defending more than one suit for the same cause of action when a very simple pro-

cedure is offered for the continuance to a conclusion of the action as originally brought.

The affidavit of defense is adjudged to be sufficient.

By the Court,
Wm. H. Kirkpatrick, *J.*

In United States District Court

Suggestion of death

Filed July 20, 1932

And now, to wit: this 18th day of July, 1932, comes Edward W. Wells, Esq., United States attorney in and for the eastern
25 district of Pennsylvania, and suggests the death of the above plaintiff, and requests the substitution of Albert H. Ladner, present collector of internal revenue as plaintiff in the above-entitled action.

Edward W. Wells,
United States Attorney.

In United States District Court

Praecipe for judgment

Filed July 20, 1932

Enter judgment in favor of the defendant and against the plaintiff in the above-entitled action, in accordance with the opinion filed April 13, 1932.

Edward W. Wells,
United States Attorney.

To the clerk, U.S.D.C. E. D. of Pa.

In United States District Court

Judgment

Filed July 26, 1932

Before Kirkpatrick, J.

And now, July 26, 1932, in accordance with the opinion of the court and by praecipe filed, judgment is hereby entered in favor of defendants and against the plaintiff, Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania.

By the Court.

Attest:
(Sgd.) E. G. Johnson,
Deputy Clerk.

26 In United States District Court

Certificate of probable cause

Before Kirkpatrick, J.

And now, to-wit: this 21st day of July 1932 the court, on motion of the United States attorney for the eastern district of Pennsylvania, representing the plaintiff in the above-entitled cause, hereby certifies that there was probable and reasonable cause for the act of said plaintiff, as collector of internal revenue, in demanding and collecting from the above defendant, the internal-revenue tax, for the refund of which a judgment has been entered in favor of the said defendant.

BY THE COURT.

Attest:
LEO A. LILLY,
Deputy Clerk.

In United States District Court

Exception

Filed Sept. 14, 1932

And now, to wit: this 14th day of September 1932 the plaintiff, Albert H. Ladner, collector of internal revenue for the first collection district of Pennsylvania, substituted plaintiff for Joseph S. MacLaughlin, now deceased, former collector of internal revenue, by his attorney, Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, excepts to the action of the court, in his opinion of April 13, 1932, adjudging affidavit of defense to be sufficient, and in holding that the cause of action had abated.

(Sgd.) EDWARD W. WELLS,
United States Attorney.
(Sgd.) THOMAS J. CURTIN,
Assistant U.S. Attorney.

27 *Order allowing exception*

And now, to wit: this 14 day of September 1932, the above exception is allowed.

(Sgd.) W. H. KIRKPATRICK, *J.*

In United States District Court

Assignment of errors

Filed Sept. 14, 1932

And now, to wit: this 14th day of September 1932, comes Albert H. Ladner, collector of internal revenue for the first collection dis-

trict of Pennsylvania, substituted plaintiff for Joseph S. MacLaughlin, now deceased, former collector of internal revenue, plaintiff, and by his attorney, Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, makes and files this his assignment of errors:

1. The learned trial judge erred in finding as follows:

"No substitution as provided for by the act of February 8, 1899, as amended up to February 13, 1925, U.S.C.A., title 28, sec. 780, was made within six months after the expiration of MacLaughlin's term."

2. The learned trial judge erred in finding as follows:

"If no prior suit had been brought it may be assumed that MacLaughlin, the present collector, would be the proper party to sue."

3. The learned trial judge erred in finding as follows:

28 "Judge Hand in Bowers vs. American Surety Company, 39 Fed. (2) 744, and following Tyler vs. Hand, 7 How. 572, accepts the theory of fictional personality which recognizes the office as a legal person, and upon grounds of policy and convenience, I think his views should be followed."

4. The learned trial judge erred in finding as follows:

"Which suit was abated by reason of the failure of the Government to make substitution in compliance with the act of 1925 after the plaintiff left office."

5. The learned trial judge erred in finding as follows:

"Was there an abatement of the cause of action as well as of the writ? I think that it was the clear intent of the act of 1925 that there should be."

6. The learned trial judge erred in finding as follows:

"It will be noted that the act does not provide that the cause may be continued as a matter of right after the plaintiff has left office by a mere formal substitution of his successor. The act says that if certain things are satisfactorily shown to the court it shall be competent for the court to permit the cause to be continued and maintained by the successor in office."

7. The learned trial judge erred in finding as follows:

"Suppose the court, properly exercising the discretion thus given, decides against permitting the cause to be continued. To hold
29 that the cause of action was not abated would mean that after the court had so refused to permit a substitution, the abatement could be avoided and the act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector."

8. The learned trial judge erred in finding as follows:

"Such futile legislation is not presumed to have been in the mind of Congress. The act could have been only upon the theory that the cause of action abated."

9. The learned trial judge erred in finding as follows:

"In addition there is no injustice in refusing to permit parties to be harassed by the necessity of defending more than one suit for

the same cause of action when a very simple procedure is offered for the continuance to a conclusion of the action as originally brought."

10. The learned trial judge erred in refusing to sustain plaintiff's motion for judgment for want of sufficient affidavit of defense.

11. The learned trial judge erred in refusing to direct the entry of judgment in favor of the plaintiff and against the defendant.

12. The learned trial judge erred in dismissing plaintiff's motion for judgment for want of a sufficient affidavit of defense.

13. The learned trial judge erred in directing the entry of judgment for the defendant.

30 14. The learned trial judge erred in adjudging defendant's affidavit of defense sufficient.

15. The learned trial judge erred in not adjudging defendant's affidavit of defense insufficient.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

(Sgd.) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Petition for appeal

And now, to wit: this 14th day of September, 1932, comes Albert H. Ladner, collector of internal revenue for the first collection district of Pennsylvania, substituted plaintiff for Joseph S. MacLaughlin, now deceased, former collector of internal revenue, feeling himself aggrieved by the judgment entered herein on July 26, 1932, in favor of the defendant and against the plaintiff, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit, and that upon the service of a citation said appeal may operate as a supersedeas until the final disposition of the cause by the United States Circuit Court of Appeals, Third Circuit, and in support of this petition, petitioner hereby presents his assignment of errors, and prays that said case may be certified to the said Circuit Court of Appeals for the Third Circuit.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

(Sgd.) THOMAS J. CURTIN,
Assistant United States Attorney.

31 *Order allowing appeal*

Before Kirkpatrick, J.

And now, to wit: this 14th day of September, 1932, it is ordered that the appeal be allowed as prayed for.

By the court:

(Sgd.) W. H. KIRKPATRICK.

In United States District Court

Præcipe for record

Filed Sept. 14, 1932

To the Clerk of the Court:

Prepare transcript of the record in the above-entitled case for filing in appeal to the Circuit Court of Appeals, and include the following:

Docket entries.

Statement of claim.

Affidavit of defense by National Surety Company.

Motion for judgment for want of sufficient affidavit of defense.

Præcipe to enter rule for judgment for want of sufficient affidavit of defense.

Opinion Judge Kirkpatrick adjudging affidavit of defense to be sufficient.

Suggestion of death of Joseph S. MacLaughlin, requesting the substitution of Albert H. Ladner, collector of internal revenue.

Judgment in favor of defendants.

Certificate of probable cause.

Exception.

Assignment of errors.

32 Petition for appeal.

Order allowing petition for appeal.

Clerk's certificate.

and no others.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

(Sgd.) THOMAS J. CURTIN,
Assistant United States Attorney.

[Clerk's certificate to foregoing transcript omitted in printing.]

33 [Minute entry of argument and submission, Dec. 9, 1932, omitted in printing.]

34 In United States Circuit Court of Appeals for the Third Circuit

No. 4994. October term, 1932

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, APPELLANT

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY, APPELLEES

Upon appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

Filed February 6, 1933

Before Buffington, Davis, and Thompson, Circuit Judges

Per curiam.

Suit was brought in the court below to recover from the Philadelphia Barge Company and its surety upon a bond given to secure payment of taxes. The facts are sufficiently set forth in the opinion of the court below. MacLaughlin v. Philadelphia Barge Co., 60 F. (2d) 333.

35 The court having adjudged the affidavit of defense sufficient, the United States attorney, on behalf of the collector of internal revenue, caused judgment to be entered for the defendants. This appeal is from that judgment.

We find no error in the conclusion of the court below that the suit had abated by reason of failure to substitute the respective successive collectors from time to time in accordance with the provisions of the act of February 8, 1899, as amended. 28 U.S.C.A., sec. 780.

Judgment affirmed.

A true copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

36 In United States Circuit Court of Appeals for the Third Circuit

No. 4994. October term, 1932

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY, APPELLEES

Judgment

Filed February 6, 1933

On appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, February 6, 1933.

J. W. THOMPSON,
Circuit Judge.

[File endorsement omitted.]

37 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Appellant's petition for rehearing

Now comes the appellant, Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, plaintiff below, by his attorney Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, and files this his petition for rehearing, and for his reasons therefor says:

1. In passing upon the question, to wit, the applicability of the act of February 8, 1899, as amended, and if so, whether the abatement provided therein goes to the writ only or to the cause of action, it being one founded on contract, the court failed to consider "whether the abatement provided therein goes to the writ only or to the cause of action", which is a really vital issue of the instant case.

38 2. In passing upon the question as aforesaid, the court failed to take into consideration the actual status of the appellant herein with respect to the time he was substituted as plaintiff for his deceased predecessor in office, Joseph S. MacLaughlin, who was the only other plaintiff collector in the instant case.

3. In passing upon the question as aforesaid, the court failed to take into consideration that the instant case is one founded on contract, and as such is differentiated from other cases held to have abated by virtue of the aforesaid act of Congress, as amended.

4. That the opinion does not conclude the litigation in the instant case and does not show a course of procedure for future guidance.

The plaintiff-appellant therefore respectfully submits to the court that in consideration of the foregoing, this his application for a rehearing should be granted.

Respectfully submitted.

EDWARD W. WELLS,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

I hereby certify that the foregoing petition for rehearing has been prepared at the request of Albert H. Ladner, Jr., collector of internal revenue, appellant; that I believe the petition to be meritorious; that the same is filed in good faith and is not interposed for the purposes of delay.

EDWARD W. WELLS,
United States Attorney.

39 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order denying rehearing

Filed March 11, 1933

And now, to wit: March 11, 1933, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

PER CURIAM,
BUFFINGTON,
Circuit Judge.

[File endorsement omitted.]

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 In United States District Court for the Eastern District of Pennsylvania

[Title omitted.]

Petition

Filed June 1, 1933

Petition of Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, by Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, respectfully shows:

1. That Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, plaintiff herein, died while the case was under consideration by the trial judge.

2. That on July 20, 1932, the suggestion of death of Joseph S. MacLaughlin was noted on the record and Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, present plaintiff, was substituted for the aforesaid Joseph S. MacLaughlin.

3. That on July 26, 1932, judgment was inadvertently entered against Joseph S. MacLaughlin instead of against Albert H. Ladner, Jr., thru a clerical error.

4. That on March 11, 1933, the Circuit Court of Appeals, Third Circuit, affirmed the opinion of the lower court and returned
42 its mandate to the District Court on May 29, 1931.

That it was only upon preparing the record for certiorari to the United States Supreme Court that the formal defect in the entry of the judgment was noted.

6. Wherefore, it is respectfully requested that the formal defect in the entry of the aforesaid judgment as against Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, be corrected nunc pro tunc and that the judgment be ordered to read as against Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania.

And he will ever pray, etc.

/s/ EDWARD W. WELLS,
United States Attorney.

43 [Duly sworn to by Edward W. Wells, jurat omitted in printing.]

44 In United States District Court

[Title omitted.]

Order correcting judgment

Filed June 2, 1933

And now, to wit: this 2d day of June 1933, on hearing and consideration of the within petition, it is ordered that same be granted and that the judgment entered in the within case against Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, be and hereby is, corrected to read against Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, nunc pro tunc.

By the court:

/s/ W. H. KIRKPATRICK, *J.*

45 In United States District Court

Stipulation as to amended judgment

Filed June 6, 1933

Whereas the above case was argued in the Circuit Court of Appeals, Third Circuit, and the District Court's opinion affirmed, and the mandate of the Circuit Court was returned to the District Court;

Whereas the plaintiff intends to file a petition for writ of certiorari to the United States Supreme Court;

Whereas the record did show a clerical error in the entry of the judgment against Joseph S. MacLaughlin, former collector of internal revenue, first collection district of Pennsylvania, now deceased;

Whereas the trial judge, upon consideration and hearing of a petition by the plaintiff, did correct a formal defect in the entry of judgment, nun pro tunc, to be as against Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, instead of against the aforesaid Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, now deceased:

It is hereby stipulated and agreed by and between counsel
46 for the plaintiff and counsel for the defendant that the amended judgment may be incorporated into the record to be filed in the Supreme Court with the petition for writ of certiorari.

/s/ EDWARD W. WELLS,
United States Attorney.

/s/ SAUL, EWING, REMICK & SAUL,
Attorneys for Defendant.

47 [Clerk's certificate to foregoing papers omitted in printing.]

48 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 37,756. U.S. Circuit Court of Appeals, Third Circuit. Term No. 153. Alvin F. Fix, Collector of Internal Revenue for the First Collection District of Pennsylvania, Petitioner, vs. Philadelphia Barge Company and National Surety Company. Petition for a writ of certiorari and exhibit thereto. Filed June 9, 1933. File No. 153 O. T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933